In the Supreme Court of the United States

OCTOBER TERM, 1955

No. 185

WAGNER IRON WORKS, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD; INTERNATIONAL UNION, UNITED AUTOMOBILE, AIRCRAFT AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA (CIO); AND BRIDGE, STRUCTURAL & ORNAMENTAL IRON WORKERS SHOPMEN'S LOCAL 471 (AFL)

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE NATIONAL LABOR RELATIONS BOARD

1. The Government does not oppose the granting of certiorari with respect to Questions 1 and 2 in the petition. Although we believe that the decision of the court below is correct, for the reasons summarized therein, Questions 1 and 2 are identical with those presented in *Mastro Plastics* v. *National Labor Relations Board,* in which this Court has granted

certiorari.[1] 348 U. S. 910, No. 19, October Term, 1955.

2. Petitioner's Question 3 presents no issue for review by this Court. Section 10 (a) of the National Labor Relations Act[2] makes it clear that agreements providing for the arbitration of labor disputes cannot serve to displace the Board's exclusive jurisdiction to prevent unfair labor practices defined in the statute. *National*

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[1] There is one important factual difference between the instant case and *Mastro Plastics* which possibly could bring about a different legal conclusion. In the latter case the strike alleged by the employer to be in violation of Section 8 (d) of the National Labor Relations Act was called by the union which was a party to a collective bargaining agreement with the employer. In the instant case the strike was called by a union which was not a party to the collective bargaining agreement. Section 8 (d) provides that "no party to such contract shall terminate or modify such contract" without observing the requirements prescribed therein. The court below, concurring in the views of the Second Circuit in *Mastro Plastics*, 214 F. 2d 462, held generally that Section 8 (d) did not apply to strikes called to protest an employer's unfair labor practices. The court, therefore, did not deem it necessary to pass upon the alternative ground, relied upon by the Board, that in any event Section 8 (d) is inapplicable to such a strike called by a union not a party to the collective bargaining agreement. If certiorari is granted in this case, the Board will of course rely upon the alternative ground as an additional reason for affirmance.

[2] Section 10 (a) reads, in relevant part:

> The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce. This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise: * * *.

Labor Relations Board v. *UAW, Local 291,* 194 F. 2d 698 (C. A. 7); *National Labor Relations Board* v. *Walt Disney Productions,* 146 F. 2d 44, 48 (C. A. 9), certiorari denied, 324 U. S. 877; *National Labor Relations Board* v. *Bell Aircraft Corporation,* 206 F. 2d 235, 237 (C. A. 2); cf. *National Labor Relations Board* v. *General Motors Corporation,* 116 F. 2d 306, 312 (C. A. 7). There are no contrary decisions. Accordingly, the petition for a writ of certiorari should be denied so far as it relates to Question 3.

Respectfully submitted.

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Solicitor General.

THEOPHIL C. KAMMHOLZ,
General Counsel,
National Labor Relations Board.

JULY 1955.

U. S. GOVERNMENT PRINTING OFFICE: 1955

FILED
SEP 28 1955
HAROLD B. WILLEY, Clerk

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Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

REPLY MEMORANDUM OF THE PETITIONER WAGNER IRON WORKS.

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THE BUNTHORP-WARREN PRINTING COMPANY, CHICAGO

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I. Reply to National Labor Relations Board's Memorandum.

1. The statement in the National Labor Relations Board's Memorandum, that the Government does not oppose the granting of certiorari respecting Questions 1 and 2 in the Petition, is an admission that the Wagner

Petition for Certiorari is well-founded and should be granted.

2. The suggestion in the footnote on Page 2 of the NLRB's Memorandum that "there is one important factual difference between the *Mastro Plastics* case and the *Wagner* case, which possibly could bring about a different legal conclusion", because in this case "the strike was called by union which was not a party to the collective bargaining agreement" while in the *Mastro Plastics* case "the strike was called by the union which was a party to the collective bargaining agreement", is clearly erroneous. The contention of the National Labor Relations Board in the Court below (which that Court ignored) that Section 8(d) of the Labor Management Relations Act is inapplicable to a strike called by a union not a party to the collective bargaining agreement, strikes us as absurd. There is no such thing as a "strike" by a union. Since a union cannot *work,* neither can it *strike.* A union can urge employees to strike, but the union itself obviously cannot strike. A strike must necessarily be by workers; and only a strike by employees can cause damage. The employees who struck in this case were parties to the collective bargaining agreement, which agreement was made for them by their AFL Union as their agent—their "agent for and acting in behalf of the Company's production employees" (Bd. Exh. 6, B. A. 881, W. A. 185). Therefore, the strike by the employees who were parties to the labor contract, was in violation of Section 8(d) of the Labor Management Relations Act.

3. Furthermore, a person who causes a breach of contract is not immune from liability merely because he is not a party to the contract. On the contrary, a third party who interferes with another's contract, or causes a breach thereof, is liable for the damages he causes, or he may be

enjoined.[1] For the Board to argue that a labor union (or anyone else) may cause a breach of contract between contracting parties with impunity, is to argue for a novel, lawless and vicious doctrine.

4. NLRB counsel also question the propriety of reviewing the Petitioner's Question 3, by arguing that Section 10(a) of the Labor Management Relations Act provides that agreements for the arbitration of labor disputes cannot displace the Board's exclusive jurisdiction to prevent unfair labor practices. That argument is beside the point presented by Petitioner's Question 3. The provision of Section 10(a) invoked by the Board merely means that employers and employees cannot contract to oust the Board's jurisdiction to enjoin unfair labor practices. However, that should not prevent the parties to a labor contract from agreeing to arbitrate disputes arising between them. We submit that a dispute should not be adjudged an unfair labor practice when an existing contract requires the parties to submit the dispute to arbitration.

5. Arbitration should be favored by the Board as well as by the Courts, instead of being condemned or ignored. Arbitration of labor disputes is far more preferable to proceedings before the Board. Anybody who has had experience in the labor-management relations field would choose arbitration every time, in preference to the endless and expensive proceedings before the Board.

6. Centuries ago, because of their jealousy for their own jurisdiction, the English courts refused to enforce agreements for arbitration of disputes upon the ground

1. *Angle* v. *Chicago, etc. R. Co.*, 151 U. S. 1.
Bitterman v. *Louisville & N. R. Co.*, 207 U. S. 205.
Hustings Co. v. *Coca Cola Co.*, 205 Wis. 356, 365, 237 N. W. 85.
Johnson v. *Aetna Life Ins. Co.*, 158 Wis. 56, 147 N. W. 32.
24 A. L. R. 43, 46, 52-61 (citing scores of cases).
26 A. L. R. (2d) 1234, *et seq.*

that the courts were thereby ousted from their jurisdiction. This jealousy became embedded in the common law and was for a time adopted by American courts, though the American courts criticized the rule as illogical and unjust.

7. Congress finally abolished the old common law rule by enacting the Federal Arbitration Act (9 U. S. C. A. Sec. 1, *et seq.*). Today agreements for the arbitration of disputes are generally held valid.

8. As said in 3 Am. Jur. 835 (Sec. 4):

> "* * * the very decided tendency of modern authorities is away from the more artificial doctrine of the older decisions and in the direction of the more intelligent view that arbitration, as an inexpensive, speedy, and amicable method of settling disputes, and as a means of avoiding litigation, should receive every encouragement from the courts which may be extended without contravening sound public policy or settled law." (Citing *Burchell* v. *March*, 17 How. (U. S.) 344, 15 L. Ed. 96, where the court said that arbitration should receive every encouragement from courts of equity.)

9. If the mandatory arbitration provision in the labor contract here involved (Contract, Sec. 15A, W. A. 191) depends upon the rule of *lex loci contractu*, as we think it clearly does (15 C. J. S. 854 (3)) then Wisconsin law should apply. Under Wisconsin law, as pointed out in our Petition for the Writ of Certiorari, P. 25, the arbitration provision in the labor contract is specifically enforceable and recent decisions of this Court seem to be to the same effect.

10. Surely, it is time to declare that unions and employees must abide by their contracts, no less than employers. Also, that when a labor contract provides for the arbitration of labor disputes, such provision is enforceable. For arbitration of labor disputes is far, far better than the endless, expensive and often futile proceedings before the Board.

II. Reply to CIO Union's "Cross-Petition for Writ of Certiorari".

1. The CIO Union has filed a Cross-Petition for a Writ of Certiorari in the above case, seeking to review that part of the decree of the lower court which denied enforcement of the National Labor Relations Board's order for reinstatement of 22 night-shift workers.

2. The CIO's Cross-Petition presents no issue for review by this Court. The CIO's brief (Page 7) admits that even if the Board's order for reinstatement of 22 of the night-shift employees was correct and the refusal of the Court of Appeals to enforce it was erroneous, that would not support an independent Petition for a Writ of Certiorari. We submit that admission puts the CIO out of court.

3. The claim on Page 7 of the CIO's Cross-Petition, that the decision below is a misapplication of *R. R. Donnelley & Sons Co.* v. *NLRB*, 156 Fed. (2d) 416 (C. A. 7), is groundless. On the contrary, the Court below cited and followed the *Donnelley* case (see Opinion below, Wagner Petition for Certiorari, P. B-11). At any rate, since it is a decision by the same Court of Appeals, it cannot furnish a ground for certiorari by this Court.

4. There is no justification for the statement in the CIO Cross-Petition, Page 7, that the status of the 22 night-shift employees "was treated quite cursorily" by the lower court, in face of the very exhaustive 28 page Opinion of the lower Court.

5. The reason the Court below refused enforcement of the Board's order directing reinstatement of the 22 night-shift employees was that there is simply no basis for the

Board's ruling that the 22 night-shift employees were discharged to discourage CIO Union activity. The Company's positive and uncontradicted evidence was that 22 of the 55 night-shift employees were laid off in order to reduce its less efficient and more expensive night-shift operation and thereby to increase its more efficient and less expensive day-shift operation (W. A. 155-180, 75, 129-130, 144).

6. The Board and Board counsel themselves proved the obvious error of their conclusion that the CIO Union activity was the reason for the layoff. For their own star witness, CIO organizer Chiakulis, claimed the night shift was 100% solid CIO. Thus, in one breath they claimed that the 22 employees were laid off for CIO sympathy; in the next breath they claimed that all 55 men on the night-shift were CIO adherents. Since the other 33 night-shift employees were retained by the Company, if the layoff of 22 CIO adherents constituted discrimination against the CIO, then contrariwise we presume the retention of 33 CIO men constituted *favoring* the CIO to a greater degree. Since the Company retained more of the CIO night-shift employees than it laid off, the claim that the layoff was because the men laid off were pro-CIO was an obvious perversion. It was an attempt to ride two horses running in opposite directions at the same time. The lower Court had to reject the claim that the 22 night-shift employees were laid off to discourage CIO Union activities.

Conclusion.

We therefore, respectfully submit:

1. That Petitioner Wagner Iron Works' Question 3 should be reviewed by this Court, as well as Questions 1 and 2.

2. That the CIO Union's Cross-Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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Dated at Milwaukee, Wisconsin,
September 19, 1955.